STATE OF MICHIGAN

MICHIGAN SUPREME COURT

J & J FARMER LEASING, INC., FARMER BROTHERS TRUCKING CO., INC. CALVIN ORANGE RICKARD, JR., and JAMES W. RILEY, as Personal Representative of the ESTATE OF SHARYN ANN RILEY, Deceased,

Plaintiffs-Appellees,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.
_____/

S. Ct. No. 125818
Court of Appeals No. 239069
L.C. No. 96-3742 NO

***AMICUS CURIAE BRIEF* OF THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND THE MICHIGAN INSURANCE COALITION**
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Citizens Insurance Company of America ("Citizens") has filed an application for leave to appeal seeking review of the decision of the Michigan Court of Appeals dated February 12, 2004 or, in the alternative, for peremptory reversal. Citizens attached a copy of the decision to its Application.

QUESTIONS PRESENTED FOR REVIEW

In its December 28, 2004, Order, this Court posed the following two questions:

(1) What is the effect of the agreement at issue with respect to the tortfeasors' liability, if any, for the unsatisfied portion of the judgment?; and

(2) Under what circumstances can an assignment of a bad faith claim allow the assignee's suit against the insurer to proceed?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

The Michigan Insurance Coalition ("MIC"), American Insurance Association ("AIA"), and the National Association of Mutual Insurance Companies ("NAMIC") (collectively the "Amici") submit this *amicus curiae* brief in support of the application for leave to appeal filed by Appellant Citizens Insurance Company of America ("Citizens") on March 25, 2004. The Amici adopt Citizens' argument that this Court should peremptorily reverse the Court of Appeals' February 12, 2004 decision, or at least review that decision pursuant to MCR 7.302(B)(3) and (5). Because Citizens' Application for Leave to Appeal and Supplemental Brief in Support of Application for Leave to Appeal adequately address the legal arguments in support of the relief requested from this Court, this *amicus curiae* brief will address only the questions raised by this Court in its December 28, 2004 Order.

THE AMICI

The AIA is a national property-casualty trade organization, representing more than 435 insurers that write more than $120 billion in premiums in the United States. NAMIC is a national trade association with more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property-casualty insurance premium in the United States and its members account for 38 percent of the automobile market in the United States. MIC is a state property-casualty trade association, based in Michigan, representing individual insurers who write more than $3 billion in insurance premiums in Michigan.

These industry associations regularly appear in courts around the country providing additional analysis to assist the courts in analyzing insurance issues. The Amici's members deal

with the issues presented here in Michigan and elsewhere, and believe that they can offer a unique perspective to the Court on the issues presented.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Amici accept the Statement of Facts as set forth in Citizens' Application for Leave to Appeal to this Court.

ARGUMENT

I. The Plain Language Of The Joint Agreement Between The Estate of Sharyn Ann Riley And The Insured Tortfeasors Indisputably Extinguished Potential Liability Of The Latter To The Former – Forever – In The Absence Of Fraud Or Collusion.

Under well-established Michigan law, a breach of contract claim must have the following elements: (a) the existence of a contract, (b) the breach of that contract, and (c) damages resulting from that breach. *See e.g., GLH Trucking, Inc v R&R Heavy Haulers, Inc*, unpublished decision of the Court of Appeals, 2005 WL 77102 (Jan. 13, 2005); *Malcolm MacDowell & Associates, Inc v Ecorse-Lincoln Park Bank*, 325 Mich 591, 598; 38 NW2d 921 (1949); and *McInerney v Detroit Trust Co*, 279 Mich 42, 46, 49; 271 NW 545 (1937). The fundamental principle that a breach of contract claim cannot survive without the plaintiff incurring damages ultimately led this Court to hold that a claim for bad faith refusal to settle cannot exist when the tortfeasor in the underlying case will not be obligated to pay any excess judgment because the tortfeasor is uncollectible. Justice Levin's dissent, adopted on rehearing, is correct on this issue and should not be disturbed. *Frankenmuth v Keeley*, 433 Mich 525 (1989), *rev'd on rehearing*, 436 Mich 372 (1990).

The issue then becomes whether the particular facts of this case should fall within the rule adopted in the *Keeley* case, where the tortfeasor has assets which can be used to satisfy the excess judgment, but has protected itself against collection efforts by entering into an agreement

with the plaintiff and pledging a willingness to cooperate in a case against the tortfeasor's insurer. The Amici submit that the particular agreement entered into here releases the insured tortfeasor from any liability for an excess verdict, and thus eliminates the ability of the plaintiff to pursue any claim against the tortfeasor absent further intentional wrongdoing by the tortfeasor (such as by intentionally refusing to cooperate) or collusion between the parties to invoke the very narrow exceptions created by the agreement. In such circumstances, the *Keeley* rule should be applied, and the inability of the plaintiff to seek excess damages against the tortfeasor eliminates any basis for the tortfeasor to claim damages, thereby eliminating the bad faith claim.

As the Court of Appeals below recognized, the joint agreement between the Estate of Sharyn Ann Riley and the Farmer entities "indisputably releases the Farmer parties from any obligation to pay the underlying judgment. . .." Ct App Op, p7. In pertinent part, that joint agreement ("Agreement") provides that the Estate of Sharyn Ann Riley ("Estate") agrees "to forever forebear any action to collect any monies to satisfy the unpaid portion of the Judgment that the [Estate] has against the [Farmer entities]." Agreement, paragraph 10(b). Accordingly, the Agreement indisputably extinguishes the liability of the insured tortfeasor for the unsatisfied portion of the judgment – forever.

Citing footnote 7 in the Court of Appeals' decision below, Plaintiffs strain to argue a hypothetical basis upon which the insured tortfeasors may again somehow become exposed to liability under the unpaid portion of the judgment. Plaintiffs' Response, p 11. While this is theoretically true, such exposure could only be self-inflicted through the insured's tortfeasor's failure to fulfill the 'cooperation requirements' of the Agreement. Agreement, paragraph 10(f). Not only are such circumstances entirely hypothetical, they would require the tortfeasors

themselves – not the insurers– to act, or fail to act, in a manner that would trigger exposure to liability.

For example, the insured tortfeasor could decide to breach the agreement and not cooperate with the plaintiffs by not providing documents or witnesses. If those are the type of narrow circumstances where the Agreement's covenant not to sue can be destroyed, the tortfeasor is rewarded for acting contrary to its self interest, and bringing upon itself damages that it would not otherwise incur. Similarly, if this Court holds that the Agreement means what it says – *i.e.*, that the plaintiffs have "forever" agreed not to pursue collection – the plaintiffs and the insured tortfeasor can collude to invoke the exception in the Agreement by the tortfeasors inflicting "damage" upon themselves by not cooperating with the plaintiffs. This type of self-inflicted "damage" is not what the principles of contract law were intended to reward, and essentially creates a giant loophole that can be used by any collectable tortfeasor to forever shield themself from paying any damages, while still arguing that a "damage" has occurred that should be compensated. If an action that is contrary to self-interest, and within the insured's exclusive control, is the only way that a tortfeasor can ever be faced with "damage" through the risk of collection of the excess verdict, then such self-inflicted "damage" does not really exists unless the tortfeasor decides to create it.

The position argued by Citizens, and supported by the Amici, would not eliminate the possibility of a bad faith claim in those circumstances where a plaintiff has agreed to temporary forbearance while a bad faith claim is pursued. If the plaintiff and tortfeasor are able to establish that the insurer did act in bad faith by failing to settle the case, then the judgment would be satisfied and the tortfeasor would be at no further risk of harm. If, on the other hand, the insurer prevails in the bad faith action, then the tortfeasor is at risk that the plaintiffs will pursue a

collection action against the tortfeasor for the amount in excess of policy limits. This is not a "bad" or undesirable result, since the plaintiffs would have obtained a verdict as a result of the wrongdoing of the tortfeasor and the insurer would have provided the policy limits, for which it contracted and was paid an agreed-upon premium. In such a case, if the limits that the tortfeasor purchased are insufficient to remedy the wrong that the jury in the underlying case has found, and there is a finding that there was no bad faith in the decision not to settle the case, then contract and tort law, and public policy, support the idea that the tortfeasor should be obligated to pay the excess amounts awarded by the jury.

Finally, it should be noted that overlooking the practical consequences of the Agreement and permitting its use to avoid the consequences of *Keeley* creates a strong incentive for collusion between a tortfeasor and a plaintiff when the exposure in any case may exceed the policy limits. If plaintiff's claims regarding the Agreement prevail, the insured tortfeasor can enter into a consent judgment with the plaintiffs for an amount in excess of the policy limits, and then promptly protect itself from collection on the judgment except for narrow circumstances completely within its control, as presented in this very Agreement. Alternatively, the insured tortfeasor could execute such an Agreement before the trial, creating an incentive not to cooperate with the insurer as required under the existing insurance policy contract, and then proceed through the trial in a half-hearted manner that significantly increases the risk of an excess judgment.

Other jurisdictions have struggled with these issues. *See e.g., Romstadt v Allstate Ins Co*, 844 F Supp 361 (ND Oh, 1994)(holding that an assignee cannot maintain a bad faith claim when it has entered into a covenant not to execute against the tortfeasor); *Phillips v State Farm Mut Auto Ins Co*, 437 F2d 365 (CA 5, 1971)(holding that a collusive judgment is open to attack when

it conflicts with the rights and interests of the insurer); and *Werlinger v Warner*, 2005 WL 352084, *5 (Wash. App., Feb. 14 2005)(holding that a settlement that would form the basis of a bad faith claim should be disapproved when the tortfeasor was protected from liability for the judgment because of bankruptcy). Michigan has not addressed this issue, because Michigan has not previously allowed collusive deals that can be used to set up an insurer for a bad faith claim. The decision of the Court of Appeals in this case creates precisely this incentive.

II. The Assignment Of A Bad Faith Claim Against An Insurer Does Not Automatically Bar Suit Against The Insurer By The Assignee, But The Assignee's Rights Against The Insurer Can Be No Greater Than The Assignor's At The Time Of The Assignment.

The Court has inquired as to the circumstances under which an assignment of a bad faith claim can occur while allowing the assignee's suit against the insurer to proceed. As the Amici understand the arguments advanced by the parties, neither side is advocating a "no assignment" rule. The task of determining when such an assignment will not foreclose the possibility of a bad faith claim against the insurer thus starts from the premise that such an assignment can be made, if done properly.

Initially, the Amici submit that the original holding of *Keeley* should be preserved. Under *Keeley*, this Court adopted "a compromise between the prepayment and the judgment rule: that this Court accept the essence of the judgment rule by eliminating the need to show partial payment, but provide protection for insurers along the lines of the prepayment rule by precluding collection of the judgment from the insurer beyond what is or would actually be collectable from the insured." *Keeley* at 565. Therefore, under *Keeley*, the assignee of a bad faith claim would need to be able to demonstrate what is or would actually be collectable from the assignor/insured. If the tortfeasor/assignor does not have assets on which collection can be pursued, the bad faith claim should not proceed.

Further, the assignment of a bad faith claim should not be permitted to proceed in a case where the plaintiff in the underlying lawsuit has agreed to never pursue collection activities against the insured tortfeasor. Where such an agreement exists, the insured will never incur damages beyond the limits of the policy. In such a case, the application of the *Keeley* rule makes sense, as no breach of contract damages will be incurred by the insured, and the Court will simply be upholding its long-standing precedent that a breach of contract claim requires damages.

The doctrine should also be extended to bar assignment of bad faith claims where there is an agreement between the parties that no collection activities will ever be pursued except where (a) an intentional act of the tortfeasor occurs that is contrary to its own self-interest (such as a failure to cooperate) and within their control, or (b) the exception will not apply unless there has been collusion between the parties to the underlying suit to cause the judgment to be entered, or that would cause the exception to be activated. These exceptions are completely within the control of the tortfeasor. Except by their own choice, the tortfeasor does not become exposed unless it commits a further act of wrongdoing or an intentional act of collusion designed to preserve a bad faith claim for damages to which it is otherwise not exposed.

An agreement between an insured tortfeasor and plaintiff that leaves open the possibility that a plaintiff will pursue collection of the judgment against the tortfeasor, either before or after an appeal, creates the type of damage exposure that should be compensable in a bad faith claim against the insurer (assuming it is determined that the insurer did, in fact, act in bad faith). That type of agreement was used in *Keeley*, and should be sufficient to preserve the validity of the assignment of the bad faith claim.

The results generated by the application of this framework for permissible assignment is appropriate for several reasons. Every person makes the decision as to the level of risk that it is willing to tolerate when it purchases insurance. Other than the mandatory limits required under the No-Fault Act, Michigan does not compel an insurance consumer to purchase a certain amount of coverage. The consumer has the ability to insure itself against big exposures by purchasing higher limits. If the consumer decides to purchase low or inadequate limits, it is appropriate it that it bears that risk. If a verdict against the consumer thereafter exceeds the policy limits purchased by the consumer, the consumer/tortfeasor becomes exposed to paying damages for amounts it chose not to insure, and for damages it caused. This is not an unfair or inappropriate result.

Furthermore, this approach minimizes the risk that the parties to the underlying lawsuit will simply collude to create exposure that would not otherwise exist, or create a claim for damages that would not otherwise be incurred. Consumers/ tortfeasors should not be permitted to shift the burden of uninsured risks to the insurance industry as an alternative to purchasing adequate levels of insurance in the first place.

CONCLUSION AND RELIEF REQUESTED

The Amici respectfully requests that the Court grant Citizens' application for leave to appeal or, alternatively, peremptorily reverse the February 12, 2004 Court of Appeals opinion.

Respectfully submitted,

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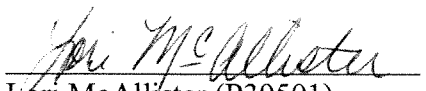

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